

10580 Respondent Failure or Refusal to Comply

10580.1 Overview: The Region is responsible for initiating further action when it concludes that a respondent has failed to comply with requirements of a settlement agreement, Board order, or court judgment. The appropriate action will depend on the status of the case, as set forth in the following sections.

10581 Noncompliance with an Informal Settlement Agreement: When a respondent fails to comply with provisions of an informal settlement agreement, the Regional Director will normally withdraw his or her approval of the agreement and issue or reissue complaint.

Note that in this event, the complaint will be pursued on the basis of the underlying unlawful actions, not solely on the basis of noncompliance with the agreement.

See Unfair Labor Practice Proceedings Manual section 10154.

10582 Noncompliance with a Board Decision and Determination of Dispute: See Unfair Labor Practice Proceedings Manual section 10214.1

10585. Noncompliance with a Board Order: Enforcement proceedings

10585.1 Overview: When a respondent fails or refuses to comply with provisions of a Board order, further proceedings to compel compliance action require enforcement of the Board order by a United States Court of Appeals. Such proceedings also provide a means by which a respondent may appeal a Board order. Compliance Manual section 10590, contempt proceedings; and section 10620, compliance proceedings, set forth procedures for compelling compliance after a circuit court of appeals has entered judgment enforcing a Board order. The following sections set forth procedures for recommending that enforcement proceedings be undertaken.

10585.2 Criteria for Recommending Enforcement Proceedings: When a Board order issues, the compliance officer should initiate prompt action to secure compliance. Normally, an enforcement recommendation should be made only after affirmative efforts have been made to procure compliance. As soon as it is clear that a respondent will not comply, however, enforcement should be recommended. A respondent may evince

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unwillingness to comply by its response to inquiries, by requesting repeated conferences, or by otherwise delaying.

Note that Compliance Manual section 10671.3 sets forth the Regional Office operational goal concerning recommendation of enforcement action. Even where investigation and discussion of compliance issues is required, prompt action should be sought, so that the Region will normally be able to submit an enforcement recommendation within 30 days of its receipt of the Board order.

The Region may recommend enforcement of a Board order notwithstanding a respondent offer of compliance or even the achievement of compliance. For example, the Region may conclude that it is appropriate to enforce a Board order against a union arising from unlawful picketing when the union has a history of similar unlawful conduct and the Region concludes that a judgment is appropriate as a basis for proceedings in the event of future unlawful conduct.

If there is a dispute over what constitutes compliance, or if the Region regards enforcement as necessary notwithstanding actual compliance, the Region's memo recommending enforcement should cover these issues.

In test of certification 8(a)(5) cases, the Region should make every effort to submit its enforcement recommendation as soon as possible, preferably within 1 week following its receipt of the Board's order.

The respondent may itself initiate proceedings before a United States court of appeals by filing a request for review of the Board order, in effect appealing the Board's Decision and Order. In such cases, it is not necessary to submit a recommendation for enforcement because the Division of Enforcement Litigation routinely files a cross-application for enforcement.

When the charging party files a petition for review, the Division of Enforcement Litigation only files an application for enforcement when the Region specifically recommends it, as the Region may have concluded that the respondent has complied with the Board order.

See Compliance Manual section 10565 regarding situations where meritorious allegations of new unfair labor practice charges are filed against a respondent subject to an unenforced Board order.

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10585.3 Foregoing Enforcement When Only Compliance Requirements Are Disputed: The respondent may dispute compliance requirements of a Board order without contesting the underlying findings that it has violated the Act. Normally, court enforcement of a Board order is required before disputed compliance requirements may be formally resolved through a compliance hearing. See Compliance Manual section 10620.

Thus, when disputed compliance issues cannot be resolved in such cases, the respondent should be asked to consider entering into a stipulation that waives enforcement proceedings while reserving its right to litigate disputed compliance issues in a compliance hearing. See Compliance Manual section 10620.2 regarding procedures for such compliance stipulations.

10585.4 Procedures for Recommending Enforcement: The Regional Director is responsible for recommending proceedings to enforce a Board order, and for advising the parties that such a recommendation has been made. The recommendation should be made to the Division of Operations Management in the form of a memorandum that sets forth efforts to procure compliance or other circumstances underlying the recommendation. The compliance officer's report, regional attorney's opinion, and copies of pertinent correspondence, including notification to the parties of the enforcement recommendation, should be attached to the memorandum.

The recommendation should also include a current service sheet, setting forth names, addresses, and telephone numbers for all parties and counsel.

Duplicate exhibits from the underlying proceedings should also be submitted, separately, under cover of a transmittal slip addressed to: Chief, Case Records Unit. The transmittal slip should contain the notation, "Enforcement recommended."

In cases involving an 8(a)(5) test of Board certification, the Regional Office should also submit the R-case transcript, original exhibits, and the Regional Office case file, without any witness affidavits, to the Case Records Unit.

If circumstances indicate that immediate injunctive relief under Section 10(e) of the Act should be considered, the Region should submit an appropriate recommendation and explanation to the Division of Enforcement Litigation with a copy to the Division of Operations Management. See Compliance Manual section 10594.

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10585.5 Compliance Action Following an Enforcement Recommendation: Neither an enforcement recommendation nor the initiation of enforcement proceedings before a United States circuit court of appeals forecloses the possibility of respondent compliance with a Board order. To the contrary, compliance may be accomplished at any time during such proceedings, and could be the basis for withdrawal of such proceedings.

Even after enforcement has been recommended, the compliance officer should pursue compliance or settlement. Any change or progress in securing compliance should be reported immediately to the Appellate Court Branch. Significant developments should also be reported to the Division of Operations Management. In general, such reports should be made by telephone.

If full compliance is secured, or if the Regional Director wants to recommend a suspension or withdrawal of enforcement action, the recommendation should be made in the form of a memorandum to the Division of Operations Management.

10585.6 Responsibility for Instituting Enforcement Proceedings: The Division of Operations Management will act on the Regional Director's recommendation by authorizing institution of enforcement proceedings and referring the case to the Division of Enforcement Litigation's Appellate Court Branch. The Appellate Court Branch will be responsible for filing the petition for enforcement of the Board order with an appropriate United States court of appeals, and for all further proceedings leading to entry of judgment by the court.

Should a respondent file a motion for reconsideration of its order with the Board after enforcement has been recommended, the Region should notify the Appellate Court Branch promptly.

10586 Responsibility for Supreme Court Proceedings: In the event of a circuit court judgment failing to enforce a Board order in whole or in part, the decision as to further action, including Supreme Court action, will be made in Washington. The Region will be advised by Washington, and will then advise the parties.

10588 Noncompliance with a Court Judgment

10588.1 Overview: If a respondent fails or refuses to take the compliance actions required by a court judgment, two courses of action are available. In cases where a respondent refuses to comply with the

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clear requirements of the judgment (other than payment of backpay; for these, see secs. 10590.8 and 10593), or raises only frivolous or insubstantial defenses to compliance, contempt proceedings are prima facie warranted. See, for example, sections 10527.7, 10590.4(a), 10590.9, 10592.1(a), and 10620.1. If, on the other hand, respondent's refusal gives rise to a bona fide dispute regarding its obligations under the judgment, the Region may, subject to the provisions of sections 10527.7, 10590, and 10592, pursue compliance through issuance of a compliance specification.

See Compliance Manual section 10620 regarding compliance issues that should be pursued through a compliance hearing, and procedures for issuing a compliance specification and conducting a compliance hearing.

The following sections set forth criteria for recommending contempt proceedings to the Contempt Litigation Branch and procedures for instituting such proceedings.

10590 Allegation of Noncompliance with Enforced Board Order or New Charges Filed Against Respondent Subject to Outstanding Judgment

10590.1 Generally: If a report of noncompliance with a court judgment is received, the person making the allegation should be asked to specify the defects in compliance and should be asked to submit whatever evidence is available. If there appears to be merit to the allegation, appropriate investigation should be undertaken.

See Compliance Manual section 10570 regarding allegations of noncompliance with an unenforced Board order.

If the Regional Director determines that compliance has been achieved, the procedures set forth in Sections 102.52 and 102.53 of the Board's Rules and Regulations concerning compliance determinations apply. See also Compliance Manual section 10575.

If the allegation of noncompliance with an affirmative provision is meritorious and is not resolved voluntarily and expeditiously, the Region should, in the absence of an order staying the judgment, submit the matter by memorandum to the Contempt Litigation Branch, with a recommendation whether contempt proceedings are warranted. See Compliance Manual section 10592.1(a).

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See Compliance Manual section 10592.3 regarding criteria for contempt.

When a new unfair labor practice charge has been filed, the Region should follow the procedures set forth in sections 10590.3 and 10590.4, below.

In view of the heavier burden of proof in contempt proceedings, the Region, in the investigation of noncompliance, should secure testimonial (affidavit or deposition) and documentary evidence whenever possible. In addition to the initial written requests for compliance following issuance of the judgment, subsequent requests for compliance should be confirmed in writing, including any deadlines for compliance or statements that contempt proceedings may be recommended, absent compliance.

If it appears that contempt proceedings may be recommended, the Region should document the time and expenses necessary to investigate and process the case. See Compliance Manual section 10592.6.

10590.2 Investigation: The heavier burden of proof applicable to contempt proceedings requires that investigations of allegations of noncompliance be especially thorough. Regions should make appropriate use of investigative subpoenas ad testificandum and duces tecum as necessary to the investigation. Where the witness is cooperative and forthcoming, a voluntarily given affidavit normally will be appropriate. On the other hand, where it is expected that the witness will be evasive or testify only under compulsion, a subpoena should be issued and a deposition, rather than an affidavit, should be taken. Depositions may also be appropriate where there are tactical reasons for doing so or where it appears that a net saving of Agency resources will be realized. For example, when doing so will increase the likelihood of settlement, the Region may take a deposition even of a cooperative witness.⁹⁵

⁹⁵ The Board's investigative authority under Sec. 11 includes the power to require responses to written questions (see *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981); *EEOC v. Maryland Cup*, 785 F.2d 471, 478–479 (4th Cir. 1986), cert. denied 479 U.S. 815 (1986)); to compel the production of documents (see, e.g., *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113–114 (5th Cir. 1982); *EEOC v. Maryland Cup*, supra at 476–478); and to require oral testimony before the investigator concerning the matters in question (see *NLRB v. Thayer*, 201 F.Supp. 602, 604 (D. Mass. 1962); *FTC v. Standard American, Inc.*, 306 F.2d 231, 233–236 (3d Cir. 1962); *FTC v. Scientific Living, Inc.*, 150 F.Supp. 495, 497–499 (M.D. Pa. 1957), affd. 254 F.2d 598 (3d Cir. 1958), cert. denied 358 U.S. 867, rehearing denied 358 U.S. 938). Such investigative subpoenas can be directed not only to the charged party, but to another party that might be derivatively liable for unfair labor practices (*NLRB v. CCC Associates*, 306 F.2d 534, 537–540 (2d Cir. 1962); *NLRB v. Thayer, Inc.*, 201 F.Supp. at 603–604); or, indeed, to any person having information relevant to the investigation (*Link v. NLRB*, 330 F.2d 437, 440 (4th Cir. 1964)).

The subpoena power of an administrative agency has been compared to that of a grand jury, which “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *United States v. Powell*, 379 U.S. 48, 57 (1964), quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642–643 (1950). Moreover, except where the subpoena is subject to the Right to Financial Privacy Act (see Compliance Manual secs. 10593.6 and 10601.3), the Board is under no duty to notify the “target”

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Regional Directors are authorized to issue Section 11 subpoenas, both ad testificandum and duces tecum, to investigate allegations of noncompliance with a judgment enforcing a Board order. However, when these allegations concern conduct not clearly within the scope of the judgment, authorization to issue an investigative subpoena must be secured from the Division of Operations Management. A copy of the Region's memorandum seeking authorization should be sent to the Contempt Litigation Branch. See also Compliance Manual section 10601.2

Any question of whether particular conduct or alleged noncompliance falls within the scope of a judgment should be resolved after consultation with the Contempt Litigation Branch.

If a Section 11 subpoena is directed to a financial institution seeking the records of an individual or a partnership of five or fewer individuals, the subpoena must comply with the procedural requirements of the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. The Region should consult with the Contempt Litigation Branch before issuing subpoenas for such records. However, the Right to Financial Privacy Act does not restrict the Government's authority to issue administrative subpoenas for the financial records of corporations, unincorporated associations, or partnerships other than those comprised of five or fewer individuals, or to issue subpoenas under Fed.R.Civ.P. 45 for records of a party to pending litigation. No prior consultation is required in such circumstances. See Compliance Manual section 10593.6.

If the Region has reason to believe that a claim of privilege will be raised as a defense to the subpoena, e.g., when the subpoena is addressed to a medical doctor, an attorney, or a news reporter, clearance should be obtained from the Division of Operations Management prior to issuance.

Copies of subpoenas issued at the Regional Director's discretion, together with a memorandum setting forth the bases on which the subpoena was issued, should be sent to the Division of Operations Management.

In accordance with Unfair Labor Practice Proceedings Manual Sections 11770.3, 11790, and 11790.3, any subpoena enforcement problems should be reported to the Division of Operations Management, with a copy to the Special Litigation Branch.

of its investigation when it issues a subpoena to a third party, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984), nor is it required, absent a showing of undue burden, to reimburse the subpoenaed party for the costs of complying, see, e.g., *EEOC v. Maryland Cup Corp.*, supra at 477.

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Copies of enforcement papers should also be submitted to the Division of Operations Management.

Where a supplemental judgment liquidating backpay has issued, discovery may be conducted pursuant to Fed.R.Civ.P. 69(a), which incorporates the discovery provisions of Fed.R.Civ.P. 26 to 37 and 45. To facilitate Rule 69 discovery, the Region should register the judgment in an appropriate district court or courts under 28 U.S.C. § 1963.⁹⁶ See Compliance Manual section 10593.5.

10590.3 Conduct Not Clearly Covered by an Outstanding Judgment; Possible New Unfair Labor Practice: If the conduct comprising the alleged noncompliance may also constitute a new unfair labor practice, the party raising the allegation should be advised of this and of the possibility that unless a new charge is filed, the expiration of the 10(b) period may preclude the issuance of a complaint. A new charge may be requested when the incident that is the subject of the dispute is not clearly encompassed by the terms of the decree.

The Region should consult with the Contempt Litigation Branch if it has any questions in this regard. Of course, the party raising the allegation may, on its own initiative, file a new charge. The investigation of the allegation of noncompliance and of the new charge should proceed simultaneously.

10590.4 New Charge Filed Against a Respondent Subject to an Outstanding Court Judgment: At any time following the issuance of a judgment, charges may be filed that allege unlawful conduct by a respondent that is subject to an outstanding court judgment. When charges are filed, regardless of whether they are accompanied by a specific allegation of noncompliance with the court judgment and regardless of whether the court judgment resulted from charges filed in another Regional Office, the Region should initially determine whether the respondent is subject to a judgment arguably encompassing the charged conduct. If so, the Region should follow these procedures:

- a. Submission to Contempt Litigation Branch: Following the investigation, if the charge has merit and if the conduct is arguably encompassed by the provisions of the judgment (see Compliance Manual section 10592.3(a)), the matter should be submitted by memorandum

⁹⁶See *Fox Painting Co. v. NLRB*, 797 F.Supp. 577 (E.D.K.Y. 1992), appeal pending, No. 92-6083 (6th Cir.).

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to the Contempt Litigation Branch, Division of Enforcement Litigation, with a copy to the Division of Operations Management. The memorandum should contain a Regional recommendation concerning the appropriate course of action, such as issuance of complaint or institution of contempt or alternative proceedings. See Compliance Manual section 10592, generally, and section 10592.4 regarding the contents of such a memorandum. Any doubt whether the allegation is arguably encompassed by the judgment should be resolved in favor of submitting the case for contempt consideration.

The Region is authorized, prior to submitting the matter to Contempt, to approve unsolicited withdrawal requests submitted by the charging party in those situations in which the investigating agent did not participate in securing the withdrawal or adjustment of the case. In cases of doubt, the Region may consult with the Contempt Litigation Branch.

- b. Deferral of issuance of complaint, withdrawal, or settlement: When the matter has been submitted to Contempt, the Region should not issue complaint, approve a withdrawal, or settle the case until the General Counsel has decided whether to recommend, and the Board has decided whether to authorize, the institution of contempt proceedings.

If contempt is authorized, the Region should take no action on the matter without the authorization of the Contempt Litigation Branch. Thus, there may be circumstances in which, for policy reasons, following review of the Region's submission by the Contempt Litigation Branch, the Region may be authorized to proceed administratively, notwithstanding the Board's authorization of contempt proceedings (e.g., when the same facts demonstrate violations of different sections of the Act, only some of which are covered by the judgment, or when 10(j) or 10(l) relief is needed).

In cases when a Regional dismissal has been appealed and the appeal has been sustained and the Region directed to issue complaint, the Region should proceed under paragraph (a), above.

10590.5 Allegation of Noncompliance Clearly Encompassed by Affirmative Provisions of the Judgment; New Charge Not Warranted: If the allegation of noncompliance involves conduct clearly encompassed by the affirmative provisions of the judgment, the filing of a new charge probably will not be warranted. For example, where the respondent has

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not complied with a notice posting or expunction requirement, the filing of a new charge would not be warranted, because such conduct does not amount to a new unfair labor practice. However, if the conduct complained of arguably may constitute a new unfair labor practice (e.g., a subsequent discharge for union activities), the better course of action is to suggest that a new charge be filed, in order to avoid possible 10(b) problems. See Compliance Manual section 10590.3, above.

10590.6 Regional Analysis of Compliance with Negative Provisions; Recidivism; Potential Contempt Issues: Whenever a question arises concerning whether the respondent is violating a negative provision of an enforced Board order, the Region should consider whether the alleged noncompliance or violation constitutes contumacious conduct, even when the conduct is not ongoing and when the respondent has agreed to refrain from further violations in the future.

If the Region determines, after investigation, that the conduct arguably violates an outstanding judgment, the matter should be submitted to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation about the propriety of contempt proceedings. If the Region is in doubt about whether to recommend contempt, it should consult telephonically with the Contempt Litigation Branch. This is especially true when the respondent's operations extend beyond the Region's boundaries. Where the conduct appears isolated and when no charge has been filed or where the respondent has expeditiously remedied the violation, the Region need only consult telephonically with the Contempt Litigation Branch.

In those situations when a new charge is filed, see Compliance Manual sections 10590.3 and 10590.4.

10590.7 Regional Action; New Charge Not Filed: On the basis of the investigation and any consultation with the Contempt Litigation Branch, the Region should take appropriate action: Advise the complaining party that the terms of the judgment are being complied with or advise the respondent, with confirmation in writing, of action necessary to remedy the defect. For example, if the Region finds merit to an allegation of noncompliance with an expunction remedy, the Respondent should be notified accordingly and directed to cure the defect. If the Region concludes that the respondent is not complying and all reasonable efforts to achieve voluntary and expeditious compliance fail, the Region should submit a memorandum recommending further action, such as contempt or other alter-

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native proceedings, to the Contempt Litigation Branch, with a copy to the Division of Operations Management. Regions are encouraged to confer informally with the Contempt Litigation Branch before formally submitting cases.

10590.8 Backpay Cases: On refusal to comply with the backpay provisions of a court judgment, the appropriate course of action by the Region will be determined by the status of the case and the nature of the respondent's backpay liability, considered in conjunction with the Region's assessment of any inability-to-pay defense raised by the respondent, as well as derivative liability issues. See Compliance Manual section 10596 for a discussion of derivative liability. As used in this section, "backpay" refers to any monetary remedy imposed by the Board.

- a. Liquidated versus unliquidated judgment: The court judgment may enforce a Board order containing a generalized "make-whole" remedy, or it may state specific amounts of backpay or other monetary awards due to named discriminatees or other entities, such as a benefit trust fund. The latter form of judgment is usually entered only after supplemental backpay proceedings have been conducted, whereas the former is analogous to an interlocutory judgment of a court fixing liability but leaving the amount thereof for future determination.⁹⁷ An unliquidated make-whole order is generally too indefinite to serve as a basis for collection proceedings, or to create a judgment lien against the respondent's property.⁹⁸

See Compliance Manual section 10593 regarding collection procedures.

- b. Unliquidated judgment: Where the only judgment in place is an unliquidated, "make-whole" judgment, the Region normally should take steps to obtain a liquidated judgment by obtaining a supplemental Board order and then referring it for enforcement. In many cases, such a judgment can be obtained by summary proceedings. In such cases, the Region should attempt to have the Board order set forth on its face the total amount of money due, including interest to as late a date as can be computed. However, if it clearly appears, on the basis of investigation, that there is no reasonable likelihood

⁹⁷ *Home Beneficial Life Insurance Co. v. NLRB*, 172 F.2d 62, 63 (4th Cir. 1949); *NLRB v. New York Merchandise Co.*, 134 F.2d 949, 952 (2d Cir. 1943); and *NLRB v. Deena Artware*, 361 U.S. 398, 411 (1960) (concurring opinion).

⁹⁸ 30 Am.Jur.2d *Executions* § 5 (1967); 49 C.J.S. *Judgments* § 458 (1947); 46 Am.Jur.2d *Judgments* § 242 (1969); 47 Am.Jur.2d *Judgments* § 1053, 1056 (1969); Annotation, 55 ALR2d 72 723 (1957); 33 C.J.S. *Executions* § 6(c) and (d) (1942).

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of collection from either the Respondent or any potentially derivatively liable entity, the Region may submit to the Division of Operations Management a recommendation that the case be closed administratively. See Compliance Manual section 10605.

- c. Liquidated judgment: In the event of the respondent's refusal to comply with a liquidated judgment, the Region should proceed as set forth below in Compliance Manual section 10593 to undertake appropriate collection action. Collection proceedings are the preferred means of securing compliance with a liquidated judgment. The Region should recommend the institution of contempt proceedings to compel payment only if:
 - 1. Collection proceedings have failed or would likely prove futile, and when circumstances indicate a likelihood of at least some meaningful recovery in contempt; or
 - 2. The Region has acquired clear and convincing evidence that some person or entity is derivatively liable; or
 - 3. The Respondent has actively evaded compliance through concealment or dissipation of assets, or other exceptional circumstances that warrant proceeding in contempt.
- d. Financial inability to pay raised as a defense: Although a respondent claiming financial inability to comply with the provisions of a judgment technically bears the burden to show "categorically and in detail" why it is unable to comply,⁹⁹ as a practical matter the Board will need to show at least some ability to comply in order to obtain a meaningful remedy in contempt.¹⁰⁰ Accordingly, whenever a respondent asserts financial inability to pay, the Region should promptly and thoroughly investigate the respondent's financial condition, including but not limited to the following: a review of financial statements and other bookkeeping records such as cash receipt and disbursement journals, banking records, tax records, the respondent's assets and encumbrances thereon, and the existence of any bases for piercing the corporate veil, setting aside fraudulent conveyances, or otherwise

⁹⁹E.g., *NLRB v. Trans Ocean Export Packing*, 473 F.2d 612, 616 (9th Cir. 1973); *NLRB v. Sally Lyn Fashions*, 112 LRRM 3039, 3053 (1982) (Special Master's Report, adopted 112 LRRM 3088 (3d Cir. 1982) (sum of present resources of all kinds must be insufficient to even partially satisfy the judgment, even if all property is sold or mortgaged); *NLRB v. Perschke Hay & Grain*, 115 LRRM 3108, 3110 (1983) (Special Master's Report), adopted 115 LRRM 3115 (7th Cir. 1984).

¹⁰⁰See *Donovan v. Sovereign Security Ltd.*, 726 F.2d 55, 60 (2d Cir. 1984).

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establishing the liability of owners, managers, affiliated entities, or others. Additionally, the Region should fully investigate and assess the respondent's ability to satisfy its obligations under the judgment by installment payments.

See Compliance Manual section 10600 regarding methods and resources for investigating a respondent's ability to pay. See also section 10590.2 regarding obtaining evidence. See section 10564.12 regarding criteria for accepting installment payments.

1. In conducting its investigation, the Region should, as necessary, obtain testimony and documents from all witnesses having relevant information, including respondent's owners, officers, managers, accountants,¹⁰¹ tax preparers, customers, and suppliers.
2. If the Region is satisfied that the respondent has no assets available and that there are no other potential sources for obtaining satisfaction of the judgment, and the case is otherwise appropriate for closing, the Region should submit the matter to the Division of Operations Management, with a recommendation regarding closing of the case, using procedures set forth in Compliance Manual section 10605. A copy of this recommendation should be sent to the Contempt Litigation Branch.
3. If, after investigation, the Region determines that the respondent has sufficient assets to satisfy or partially satisfy its liability, and if the amount of the backpay or other financial obligation has not yet been liquidated, the Region should immediately proceed to obtain a supplemental Board order and judgment liquidating the amounts due (see sec. 10590.8(b), above). Where the circumstances so warrant, the Region should take appropriate steps to obtain interim relief under Section 10(j) or 10(e) or prejudgment relief under the FDCPA. See Compliance Manual section 10594. On the issuance of a supplemental judgment, the Region should undertake collection action as set forth in Compliance Manual section 10593.

¹⁰¹ No accountant's privilege is recognized under Federal Law. See *U.S. v. Arthur Young & Co.*, 465 U.S. 805 (1984).

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4. In the event that the Region is unable to determine whether assets are available, and unless it appears that there is no realistic prospect of recovering from the respondent or any potentially derivatively liable entity, the Region should initiate or continue backpay proceedings to obtain a liquidated judgment, if no liquidated judgment has issued. While backpay proceedings are going forward, the Region should continue its investigation to determine the respondent's financial condition and to identify assets from which the judgment can be satisfied. Investigation should be conducted to uncover any concealed or fraudulently transferred assets, and to identify additional entities or individuals that may potentially be held liable for backpay. Investigation may be conducted against third parties, insofar as it relates to the existence or transfer of the respondent's assets or other bases for imposing derivative liability.¹⁰² Should the Region at any time identify an additional party or parties that potentially may be liable for backpay, the Region should promptly notify the Contempt Litigation Branch, with a copy to the Division of Operations Management, in order that the efficacy of naming such parties as additional respondents in any pending backpay proceedings may be promptly and fully considered.

10590.9 Regional Action; Reinstatement Issues: In the event the allegation of noncompliance involves a reinstatement issue, the Region, following a complete investigation of the matter and absent expeditious and satisfactory resolution of the issues, should submit the case to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with a recommendation whether contempt proceedings are warranted to secure compliance with the Board's reinstatement order. Examples of reinstatement issues include: (a) discriminatee has not received a valid offer of reinstatement from the respondent; (b) discriminatee has not been validly reinstated by the respondent; or (c) the respondent refuses to offer reinstatement for discriminatee based on asserted lack of work or unfitness of discriminatee for work. Thus, any controversy concerning reinstatement, absent satisfactory and expeditious resolution of the matter,

¹⁰² See cases cited at fn. 93. Similarly, discovery under Rule 69(a) need not be limited to parties. See, e.g., *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 562 (S.D.N.Y. 1977) (nonparty stockholder of debtor and related corporations); *Caisson Corp. v. West County Bldg. Corp.*, 62 F.R.D. 331, 334–335 (E.D.Pa. 1974) (debtor's officer and sole stockholder); *Cerami v. Robinson*, 85 F.R.D. 371 (S.D.N.Y. 1980) (discovery concerning debtor's wife's income); *G-Fours, Inc. v. Miele*, 496 F.2d 809 (2d Cir. 1974) (debtor's transfers to spouse).

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should be submitted for contempt consideration. See Compliance Manual section 10592 generally.

As noted in Compliance Manual section 10527.7, the matter should be submitted even when there appears to be a legitimate factual or legal controversy surrounding the reinstatement issue. Where the facts clearly show insufficient basis for initiating contempt proceedings, telephone consultation may suffice.

In such cases, the Region should continue to conduct whatever investigation is necessary in order to compute backpay and to prepare a compliance specification. However, the Region should defer issuance of a compliance specification until the General Counsel has decided whether to recommend or the Board has decided whether to authorize contempt proceedings.